GordonDerr LLP
ATTORNEYS AT LAW

May 28, 2009

Tukwila Planning Commission
6300 Southcenter Blvd., #100
Tukwila, WA 98188

Re: Draft Tukwila Urban Center Subarea Plan

Honorable Planning Commissioners:

This letter is submitted on behalf of WEA Southcenter LLC, a Delaware limited liability company ("Westfield"), the owner of the Southcenter Mall, presenting Westfield's comments, concerns and recommendations regarding the Draft Tukwila Urban Center Subarea Plan (the "TUC Plan" or the "Plan").

The TUC Plan is premised on a long-range vision of creating a dense multi-story mixed-use urban center in Tukwila. However, the Plan, as drafted, is inconsistent with the City's existing Comprehensive Plan, is fundamentally flawed by its lack of a sound economic foundation, fails to recognize the needs of retailers and their customers, could create wide-spread nonconformity, and unless substantially modified, could cause significant unintended adverse economic consequences -- just the opposite of the Plan's intended goals.

At the outset we must say that it is inconceivable to Westfield, after working with City planners in designing and building a $240 million expansion, that within a year after our grand opening, the City would seek to adopt a new development code that would place Westfield's entire new development into a nonconforming status.

That the Planning Commission voted on May 14th to remand this draft Plan to the Community Development Department staff for a thorough reexamination and for an update to the 2002/03 Economic Study by ECONorthwest is a necessary step in what should be a transparent process. We understand that the Planning Commission will reopen the public hearing process after the staff revises the draft plan. Westfield must have the opportunity to present its formal comments on any revised plan.

Additionally, during this remand period, we urge the City to engage with stakeholders in a meaningful dialogue regarding necessary changes to the TUC Plan. The City could form a panel of affected stakeholders from the residential, retail and office sectors to address each of the following issues:

EXHIBIT 8 DATE 5/28/09
PROJECT NAME TUC Plan
FILE NO L09-008

2025 First Avenue, Suite 500, Seattle, WA 98121-3140 206-382-9540 fax 206-626-0675 www.GordonDerr.com

1. *Consistency of the TUC Plan with the City's adopted Comprehensive Plan.* As described below, the subarea plan as drafted is inconsistent with the vision statement, policies and implementation strategies identified in the adopted Comprehensive Plan.

2. *The economic feasibility of this Plan and necessary changes to the Plan to assure its economic viability.* The 2002/2003 economic studies by ECONorthwest questioned the economic viability of mixed use multistory residential and office development with structured parking in the TUC. Recent changes in development economics appear to make such develop even less viable.

3. *The needs of retailers and their customers and changes to the Plan to address these needs.* As drafted, the plan fails to adequately consider fundamental requirements of retailers including height, location, orientation and parking.

4. *The specific public investments and economic incentives needed to achieve the "vision."* As confirmed by the City's prior economic studies, the City will need to provide significant subsidies in order for private developers to develop mixed-use, multi-story projects with structured parking.

5. *The means by which incremental redevelopment can be encouraged, rather than prohibited.* Incremental change without required compliance with all new standards can move this geographic area toward the long-range vision without stifling reinvestment. The Plan's current demand for immediate compliance will not work economically.

6. *The introduction of a phasing concept into the Plan.* This phasing plan should emphasize multifamily development surrounding the train station and river to determine if a multifamily market can be developed, monitor such development and extend multi-story/mixed use form and scale standards into other areas only when such a market has been established.

Stakeholders should have the opportunity to advise the City on revisions to the Plan before it is brought back to the Planning Commission. This would provide true dialogue and avoid the current one direction comment/response to comment approach that has failed to engage the community and provide effective public participation as required under the Growth Management Act.

In the sections below, we present Westfield's most significant concerns with the draft Plan. We trust that these concerns will be addressed during the scheduled reconsideration process. In a separate document, Westfield will be providing the Planning Commission with proposed line-by-line revisions to the Plan.

<u>The TUC Plan is Inconsistent with the City's Adopted Comprehensive Plan</u>

Less than three and a half years ago, the City of Tukwila adopted a new Comprehensive Plan under the requirements of the Growth Management Act, Chapter 36.70A RCW. With minor updates in the last three years, the Comprehensive Plan contains the guiding vision, goals and policies for the Tukwila Urban Center.

The draft TUC Plan, with its proscriptive development standards, severe use restrictions and stringent triggers for compliance, is inconsistent with the City's adopted Comprehensive Plan. Presented below are just a few examples of that inconsistency.

The adopted Comprehensive Plan provides a clear vision statement for the Tukwila Urban Center:

> *The existing Tukwila Urban Center is an economically vibrant, motorvehicle oriented area. It owes much of its success to a high level of regional accessibility and efficient local access roads, and a lack of competition within the region, as well as the 30+ year vision and vigor of its development community.*
>
> . . .
>
> *The vision for the Tukwila Urban Center's next 30–50 year future foresees a high-density area with regional employment, areas of high quality housing in concert with water amenities and within walking distance of the Sounder commuter rail/Amtrak station, shopping, and recreational opportunities for business people, residents, and visitors. Support for interlinked transit and pedestrian systems to supplement an improved road system is included in the future; as is the sensitive treatment of natural resources such as Tukwila Pond, Minkler Pond, and the Green River.*
>
> *Achieving this long-range future vision is anticipated to be a gradual process. It should be achieved by reinforcing the Tukwila Urban Center's strengths and increasing its overall attractiveness. This would support both existing businesses and the continuation of market-sensitive transitions.*

Tukwila Comprehensive Plan, December 2008 at 112 (emphasis added). There are several significant statements in the adopted Comprehensive Plan language above that appear to have been overlooked in the drafting of the current TUC Plan.

First, the vision statement explicitly recognizes the economic success of the existing auto-oriented area and the need to keep this successful economic engine running. Second, the Comprehensive Plan speaks to the transition in the TUC occurring over a 30-50 year period and specifically directs that transition to be a gradual process. Third, it emphasizes that the existing strengths of the area -- the successful auto-oriented retail establishments --should be reinforced and that existing businesses should be supported in this gradual transition. Finally, the adopted vision confirms that the transition must be based upon market sensitivity.

While the draft TUC Plan initially notes that "[t]he Regional Center owes its success to and is anchored by the newly expanded and refurbished Westfield Southcenter Mall" the draft Plan goes on to criticize auto-oriented retail and to incorrectly claim that such development is out of favor with consumers and investors. TUC Plan at 2, 3. These statements are in contrast to the Comprehensive Plan's vision statement that recognizes the continued importance of auto-oriented retail. The draft Plan also provides no gradual transition over the next 30-50 years, but rather proscribes numerous stringent development standards to be imposed immediately. The draft Plan disregards existing businesses and property owners by causing most buildings to become nonconforming structures, by causing many existing uses to become nonconforming uses, and by requiring immediate compliance with several proposed new development standards from even minimal exterior alterations. These proposed elements are in contrast to the Comprehensive Plan's statement that implementation of the 30-50 year vision should be gradual, that it should reinforce the existing strengths in the retail core and should support existing businesses.

The City's adopted Comprehensive Plan also contains several policies and implementation strategies that have not been followed in the draft TUC Plan. For example, Policy 10.1.1 states:

> *Recognize the Tukwila Urban Center as a regional commercial/industrial area, with opportunities for residential development served by a balance of auto, pedestrian and transit facilities.*

Rather than providing "opportunities" for residential development, the draft Plan essentially demands residential mixed-use development by prohibiting single-story retail development in the northern half of the TUC.

Likewise, the implementation strategy for Policy 10.1.3 directs the City to "*utilize flexible zoning regulations to allow uses including residential, retail and light industrial where appropriate*." Again, the concept of providing "opportunities" and "flexibility" have been lost in the specific, detailed, and harsh use and development standards in the draft TUC Plan.

In a similar way, Policy 10.1.4 directs the City to "*Allow residential development in proximity to water amenities or within walking distance of the Sounder commuter rail/Amtrak station…*" The prohibition on single-story retail in the northern portion of the TUC, under the draft Plan, goes far beyond "allowing" residential uses in these areas. Moreover, by imposing multi-story, mixed use requirements in areas not in direct proximity to the Tukwila Pond or the River (including the Mall itself) the draft Plan is inconsistent with the adopted policies of the City.

Significantly, Policy 10.2.5 mandates that "*Development standards should consider the needs of land owners, developers, and businesses.*" As articulated throughout this letter, the draft TUC plan, with its restrictive development standards, is inconsistent with this adopted City policy. Likewise, Policy 10.2.10 states that the City should "*Actively promote development in the Tukwila Urban Center*" by, among other things, "*supporting existing uses.*" In contrast to this policy, the draft Plan creates widespread nonconformity and discourages investment with its minimal trigger points that demand Plan compliance.

RCW 36.70A.080 allows cities, like Tukwila, to adopt subarea plans as part of the comprehensive planning process but only if the subarea plan is consistent with the existing comprehensive plan. Unless it is significantly revised, the TUC Plan faces the substantial risk of being invalidated on appeal to the Central Puget Sound Growth Management Hearings Board.

<u>The Draft TUC Plan is Not Supported by Economic and Market Conditions</u>

ECONorthwest was hired by the City in 2002 to do a market analysis of the development potential for the TUC area. The conclusions reached in its 2002 and 2003 reports, if still valid in 2009, demonstrate that the draft TUC plan is not supported by market conditions and has no reasonable economic foundation. Just a few of ECONorthwest's conclusions are summarized below.

In its March 2002 Final Report (the "March 2002 Report"), ECONorthwest evaluated the retail, office, lodging, light industrial/warehousing and multifamily housing sectors. It confirmed that retail was "clearly the strongest sector in the TUC area" and that "retail demand appears to remain strong." March 2002 Report at iii. It forecast a "long-term outlook suggesting an additional demand of 1.5 million square feet to 3.6 million square feet of retail by 2020." Id.

In stark contrast to the retail sector, market conditions for office and multifamily housing in the TUC area were found to have significant barriers to <u>any</u> future growth. While the study found some future demand for additional office space in the surrounding areas, it found an "abundant supply of office in nearby areas [beyond the TUC] with large sites and sufficient auto access." Id. The Report concluded "given the sources of competitive supply in the area, [office] developers will probably be wary about pursuing projects in the TUC." Id. at 4-7.

For multifamily, the economic conclusions were even worse than for office. The March 2002 Report focused on the extreme costs for structured parking in mixed-use residential projects. It concluded that "[s]tructured parking puts the rental rates required for a standard return beyond what the current market will currently support." Id. at 7-6. The report noted that places where structured parking has worked, Seattle, Bellevue and Redmond, have much higher land values and noted that Tukwila's land values where an order of magnitude too low to support mixed-use multifamily development:

> *Our analysis of multifamily housing suggests that land values – as driven by the demand for multifamily development sites – are less than $5 per square foot. This valuation might work in portions of the City where multifamily housing can be built with ample surface parking and no mixed-use requirements. . . . Our experience suggests that land values need to approach $50 per square foot for structured parking to be viable for a private developer without public assistance".*
>
> . . .
>
> *We are saying that a **private developer** is **unlikely** to build high-density, multifamily housing in a mixed use development **without public financial assistance. . .** Our point is that such development is unlikely, and therefore, there will not likely be much of it.*

Id. at 7-7 (emphasis in original).

ECONorthwest provided a Supplemental Report in November 2002 (the "November 2002 Report"). That report added an evaluation of owner-occupied multifamily housing. While concluding that owner-occupied multifamily housing could be better supported than rental housing, the November 2002 Report confirmed that "the feasibility of owner-occupied multifamily housing is equivalent to the feasibility of renter-occupied multifamily housing" because "most lenders analyze a condominium development as if it were going to be a rental property. . ." November 2002 Report at 14.

In March 2003, ECONorthwest produced a short memo entitled Initial Assessment of Recent Market Developments in TUC. March 2003 Report. That memo discusses Westfield's then proposed expansion and the then proposed Southcenter Square development. The memo noted that these two new major retail projects "will probably help bolster the TUC's market capture . . ." and reinforce the TUC's position as an auto-oriented regional retail center. Id. at 2. The memo also evaluated Boeing's plans for adding 2.5 million square feet of traditional suburban office development at its Longacres site. As a result, ECONorthwest concluded that the regional office market would be even more "challenging" for many years to come. Id.

Westfield received from City staff another ECONorthwest memo that contains troubling disclosures about the TUC Plan's apparent direction to intentionally reduce the value of retail properties. That memo, dated September 11, 2003, was written as "an internal one (for team members, not for public distribution)." It poses the following question:

> *Question 2: Assuming the City wants to promote urban Office and residential uses in the TOD, (1) Does the City need to remove retail entitlements in the area to get the kind of mixed-use development it desires? And (2) if it does, what reasons, if any are there to believe that the landowners will be better off for such an action?*

The memo goes on to state:

> *We are now at a point – internally and with the public – where we will be making decisions about one or two specific directions to evaluate in detail. Our goal in this memo is to provide a preliminary assessment of the economic implications of those directions so that neither the team nor the public makes choices that are unwittingly and strongly at odds with economic realities. In pursuit of this goal, we believe we are obliged, at times, to treat what we believe would be wonderful design outcomes with economic skepticism. By playing this role during our internal discussions, the planning team as a whole will be better prepared to address the varied concerns of the public.*

From this memo, it appears that ECONorthwest had concerns that the Plan would have to preclude retail uses in order to achieve its mixed-use aims, that this approach would harm existing landowners and that this approach was at odds with economic reality. There is no indication that these significant concerns were ever addressed since they were presented to the planning team nearly six years ago! However, the memo provided to Westfield by staff ended at the middle of Page 4 before any discussion of this Question 2. (See Exhibit A).

Counsel for Westfield made further inquires with staff regarding this memo. In response, staff produced the new complete version of the September 11, 2003 memo. In the complete version, Question 2 was answered by ECONorthwest at the bottom of page 4 through pages 5-7 (see Exhibit B).

In answering Question 2, ECONorthwest describes discussions between city staff and its consultant, Freedman Tung & Bottomley (FTB):

> *Among the topics of conversation during both the conference call and the subsequent September 2nd team meeting was the issue of the potential barrier that existing retail entitlements . . . presented to redevelopment of the TOD area."*
>
> *We noted in ECO's 2002 Tukwila Urban Center Market Analysis that one of the barriers to residential and office development was the relatively high land values in the area – values that are driven by the potential for retail uses. The TUC planning team noted that if the potential for retail uses could be eliminated, then the resulting decrease in land values would improve the viability of other forms of redevelopment."*

The memo goes on to propose two possible "stories" that the City could tell landowners about why they might not be hurt by removing retail entitlements.

Westfield is deeply concerned that there was not earlier full disclosure of this important memo. Additionally, the contents of this memo now confirm a deliberate attempt to devalue TUC properties through provisions of the draft TUC plan. Such an approach is ill-conceived, harmful to the City and in direct conflict with the policies adopted by the Tukwila City Council in its Comprehensive Plan.

At the April Planning Commission hearing, Westfield had not yet had the opportunity to review ECONorthwest's studies, but asked for an update to those reports given their age. We appreciate the recent commitment by the City to update these studies.

Based upon our limited analysis, we believe that economic conditions have worsened for developing in the TUC dense mixed-use multistory multifamily or office developments with structured parking.

For example, the February 2007 "Market Analysis for Tukwila International Boulevard Corridor Located in Tukwila, Washington State," prepared for the City of Tukwila by Gardner Johnson, noted the lack of any new apartment projects in the area. It stated that as of the end of the third quarter of 2006, the Tukwila/Riverton apartment submarket was slightly above the overall South King submarket at $0.90 per square foot compared to $0.89 per square foot. The King County average was $1.12 per square foot . . ." This translates to a monthly rent of $900 for a typical 1,000 square foot apartment in Tukwila.

In comparison with these very low local rental rates, we have obtained proprietary information from one of Seattle's most successful multifamily/mixed-use developers. Their data shows rental rates in apartments with structured parking, built in the last 5 years, ranging from \$1.95 to \$2.48 per square foot. This translates to a monthly rent of \$1,950 to \$2,480 for a typical 1,000 square foot apartment. This shows that Tukwila's recent rental rates as of the third quarter of 2006 were less than half of what is needed to support the City's urban multifamily concept. This does not take into account recent changes to development economics including lenders' demands for developments to produce even higher economic returns.

This information confirms to us that there will be no economically-viable market for mixed-use multifamily housing in the TUC for the reasonable foreseeable future, until developers can demand significantly higher rents or the City heavily invests in significant subsidies for such development.

We hope that with updated economic and market data, the Plan can be revised to provide a more reasonable approach to supporting retail expansion and redevelopment while addressing the long-term vision through economic incentives and public investments.

<u>Westfield has Concerns with the TUC Plan Regardless of its Development Agreement</u>

This section addresses questions posed by some members of the Planning Commission who have asked why Westfield has concerns with the draft TUC Plan when Westfield is operating under an existing Development Agreement.

First, Westfield's Development Agreement provides only limited protection from code changes. The Development Agreement is currently set to expire at the end of 2011. The Development Agreement establishes applicable zoning and development conditions only for a fixed increment of development. Westfield has already built a substantial portion of the development protected by the Development Agreement. Also, the existing Development Agreement does not apply to all of the current Mall property, since Westfield recently acquired the existing Bank of America parcel at the northeast corner of the Mall.

Second, even if Westfield and its anchors and retail tenants were fully protected into the future, which they are not, Westfield wants the surrounding community to thrive economically. If the draft Plan were adopted, it could lead to a serious decline in investment in properties around the Mall. Property owners and existing businesses could have significant disincentives to expand or even maintain their properties. It is in Westfield's interest that the TUC remain an economically strong retail center.

<u>The Plan, as proposed, would cause the Mall Buildings to become Nonconforming Structures and Several Uses at the Mall to become Nonconforming Uses.</u>

At the April 23 hearing, Westfield's Senior Architect, Stephen Hamilton, who designed the recent \$240 million expansion at Southcenter, quickly summarized many of the specific elements of the recent expansion that would have been prohibited if the draft Plan had been in place. He did not have time to present a detailed explanation, but he has done so in a meeting with the Community Development Director, Jack Pace. Mr. Hamilton also did not have time to summarize for the Planning Commission some of the future plans being considered by Westfield and why that future development would be prohibited by standards in the draft Plan.

In a separate document, along with Westfield's proposed line-by-line edits to the Plan, we will provide the list of those portions of the Plan identified by Mr. Hamilton that could cause the existing and some of the planned future developments at Westfield to be nonconforming.

Given the negative implications of nonconformity with respect to use, development, redevelopment and value, nonconformity is of significant concern to Westfield and presumably to all property or business owners.

Westfield looks forward to working with staff, during the remand process, to obtain revisions in the Plan that would permit continued redevelopment of the Mall and surrounding properties.

The TUC Plan Should Allow for Incremental Improvements without Immediately Achieving the "Vision"

As explained by Mr. Gensemer, Senior Vice-President of Development for Westfield, at the April 23 public hearing, changing the urban center from its existing condition to the full vision expressed by the Plan, will take many years and many iterations of development. As noted above, the existing adopted Comprehensive Plan calls for gradual progress toward this 30-50 year vision. Yet, as drafted, the TUC Plan demands immediate compliance with every use, form, and scale standard. The Plan should be revised to allow and encourage incremental advancements in development, rather than prohibiting redevelopment until a multi-story, mixed-use, on-the-street, proposal is presented.

A well-considered Plan would encourage property redevelopment, such as Westfield's recent $240 million expansion, which has brought significant retail sales, entertainment uses and dining opportunities to the City. Yet, Westfield's expansion would not have been financially feasible if it had to meet the form and scale standards proposed in the draft TUC Plan. Another example may be found at the recent redevelopment of the Fatigue Industrial site at Andover Park West and Baker Boulevard, where a one-story California Pizza Kitchen has activated that corner. The draft Plan would have prohibited such development. Yet, the presence of this new restaurant has helped to transition this former industrial site to commercial.

It is in the best interest of the City to allow reinvestment in properties even if those new developments cannot provide all of the elements desired in the full urban center vision. Allowing incremental advancement is entirely consistent with the adopted Comprehensive Plan, which recognizes that the vision may not be achieved for 30-50 years and that the process to achieve the vision should be gradual and should build on the strengths of existing retail businesses.

The Final Subarea Plan should consider a Phased Approach to New Development Standards

The vision expressed in the adopted Comprehensive Plan and in the draft TUC Plan is largely dependent on the successful introduction of multifamily development into the TUC. As such, serious consideration should be given, during the upcoming reevaluation process, to build specific phasing concepts and priority planning areas, into the next version of the Plan.

The revised Plan should be drafted to focus attention on the TOD Station and TOD River areas. Specific market incentives, such as waivers of fees, should be established as part of the plan to encourage the pioneers of residential development in these areas. A public-private partnership in one or more of these areas should be a commitment of the City as part of this Plan. Public structured parking to support multifamily developments should also be part of any Plan.

Few if any new restrictions should be placed on properties outside of these two areas. This will allow adequate time to demonstrate whether multifamily uses are ready to enter the TUC. If and when substantial progress is made to create a significant presence of multifamily dwelling units around the railroad station and river, then and only then should the City consider moving forward with additional elements of the plan for the TUC urban area. In this way, the City would focus its energy in the areas around the Sounder Station and river then gradually move westward with its plan requirements.

If a new market develops in the TOD Station and TOD River areas, property owners in nearby areas may find themselves with more development opportunities envisioned by the Plan. The level of incentives and public parking investments needed could also be reevaluated over time.

If mixed-use residential development gathers momentum in the TUC Urban area, conditions could be right to address further changes in the planning documents, if needed, to encourage additional mixed-use development in the Pond District and Regional Center areas. Indeed, if a significant pedestrian presence is established from the earlier phases, developers and retailers will likely voluntarily respond with the pedestrian-oriented approaches contained in the draft Plan.

It would be a grave mistake to discourage the Mall and other properties in the TUC from investing in their properties. The City can ill afford such a potential economic decline by hoping that some day these properties might be redeveloped into mixed use projects. When the market is right, such redevelopment will occur. The City should not punish successful property owners and businesses in the interim, especially when this is a 30-50 year vision and the "interim" period could last dozens of years.

The Draft Plan Appears to Violate RCW 82.02.020 and Constitutional Prohibitions Against Regulatory Takings

There are several aspects to the Draft Plan that appear to be in violation of RCW 82.02.020, that could result in regulatory takings or could be found to be illegal precondemnation.

The Plan's demand for significant open space set asides from retailers is invalid. RCW 82.02.020 prohibits "any tax, fee, or charge, either direct or indirect," on the development of land, unless it falls within certain enumerated exceptions. Washington case law makes clear that a required open space set aside or similar limitation on the developable area of a property is a "tax, fee or charge" that is prohibited by RCW 82.02.020 when it is applied as a uniform percentage not tied to the property-specific impacts of development. *See Citizens' Alliance for Property Rights v. Ron Sims*, 145 Wn. App. 649 (2008).

In *Citizens' Alliance*, the Court struck down a provision of a King County ordinance that limited clearing on rural property to a maximum of 50%. The Court held that the restriction was a "tax, fee or charge" on development, and that it was not reasonably necessary as a direct result of the proposed development. The Court reasoned that the King County provision "imposes a uniform requirement for cleared area on each lot, unrelated to any evaluation of the demonstrated impact of proposed development...the necessary proportionality that is required to fulfill the statutory exception is not satisfied." Thus, the Court held that the clearing limitation violated RCW 82.02.020.

Similarly, the requirement that every retail establishment set aside 50 square feet of open space for every 1,000 square foot of retail space developed is an illegal tax. There have been no studies done by the City to establish that such open space is "reasonably necessary as a direct result of the proposed development." Indeed, the draft Plan only imposes open space requirements for retailers in the Regional Center, TOD's and Pond District but excludes this requirement from retail establishments in the Workplace and Commercial Corridor areas of the TUC. This selective requirement confirms that the open space provision has nothing to do with open space being required because of retail use, but rather reflects the City's planning goal to provide public open space in the northern portion of the TUC.

If the City wants such public open space, it has the obligation to pay for it. Moreover, for Westfield, the Mall provides significant pedestrian space inside the mall, in its interior walkways and gathering spaces. The open space requirement should be eliminated.

Other aspects of the Plan, such as the prohibition on a single-story retail establishment, could also rise to a regulatory taking. Second-floor spaces are difficult if not impossible to rent. As such, the economic return for a building that must contain a second story, will be significantly weakened. This may result in all economically viable use being eliminated due to the second-story requirement. The combined effect of the numerous form and scale standards, coupled with the lack of any market for mixed-use multi-story residential or office projects, could be found to result in an inverse condemnation because they render properties undevelopable. The City should be prepared to face takings claims or provide financial subsidizes if it proceeds with the Plan as drafted.

The Plan, as drafted, could also be determined to be an illegal precondemnation action. Precondemnation is when a government body has intentionally manipulated zoning to depress the value of property before it is condemned. *See City of Bellevue v. Kravik*, 69 Wn. App. 735, 738, 850 P.2d 559 (1993). While there has been no explicit indication that the City of Tukwila intends to condemn any properties to achieve the TUC vision, that remains a possibility given the number of properties that appear to be inconsistent with the long-term vision. As noted above, ECONorthwest's September 2003 Report discussed an apparent objective to reduce property values by taking away retail entitlements. By creating non-conformity and imposing significant barriers to retail redevelopment, retail property values could significantly decline. This would appear to make it far less expensive for the City to acquire by condemnation properties that "stood in the way" of mixed-use development. The City should be aware, however, that it will face claims of precondemnation and would likely be required to pay in condemnation the full highest retail values, even if it adopts a new Code that strips owners of these entitlements.

We sincerely hope that significant changes are made in the Plan, during the remand process, so that these concerns are no longer an issue.

The Final TUC Plan should Recognize the Unique Characteristics of the City's Regional Mall

The TUC Plan, as now drafted, designates the Southcenter Mall part of a larger Regional Center subarea that includes other properties along Andover Park West and Strander Blvd. However, there are unique features of the Mall that have not been recognized by this approach to planning.

The Mall represents a single coordinated development comprising over 90 acres, over 1.6 million square feet of retail, restaurant, and entertainment uses, enclosed weather protected areas for shopping, dining, relaxing and meeting, over 6,500 stalls of shared parking, a network of well-planned internal circulation driveways and a site with frontage on four roadways. This regional mall, draws over 14 million customers per year from a regional geographic base who arrive almost exclusively by automobile. No other property in the Regional Center is close to being similarly situated. Yet, the Plan, as now drafted, fails to provide any recognition to the unique characteristics of the Mall.

Many of the form standards and scale regulations should not be imposed on a regional mall. Because it is a single coordinated site, Westfield requires substantial flexibility in how to redevelop. That redevelopment must grow from the inside out. Its retailers must be situated to take advantage of existing patterns of customer flow. Drive aisles that must maintain circulation cannot be turned into streets with on-street parking. The proscriptive standards in the draft Plan would prevent Westfield from pursuing its future development plans.

Many of the use restrictions have no place being imposed on a regional mall, with its internal circulation roads. As Westfield continues to reinvest and expand, there may be many opportunities to add complementary uses including other service uses, government uses, a grocery store, office uses, or a hotel. The exclusion of many uses, the prohibition of certain uses in first floor areas, and the requirement for a minimum number of residential uses in order to construct a grocery store, must be changed.

Under separate cover, Westfield is submitting proposed line-by-line edits. We are prepared to discuss these detailed changes with staff during the remand process.

Conclusion

We appreciate your consideration of these comments. We urge staff to engage with stakeholders in an effective dialogue in order to return to the Planning Commission with a revised Plan, consistent with the long-term vision, that Westfield and other stakeholders can support.

Very truly yours,

Brent Carson

BC:tt
Attachments
cc: Tukwila City Council (w/att.)
Jack Pace (w/att.)
Lynn Miranda (w/att.)
Nora Gierloff (w/att.)
David Gensemer (w/att.)
Stephen Hamilton (w/att.)

Exhibit A

Version Received April 23, 2009

ECONorthwest
ECONOMICS • FINANCE • PLANNING

VOICE• (206) 622-2403
FAX • (206) 838-5000
EMAIL • info@seattle.econw.com

412 MUTUAL LIFE BUILDING
605 FIRST AVENUE
SEATTLE, WA 98104

OTHER OFFICES
EUGENE • (541) 687-0051
PORTLAND • (503) 222-6060

Sept 11, 2003

TO: TUC study team members
FROM: Terry Moore and Brett Sheckler
SUBJECT: ASSESSMENT OF FISCAL CASE FOR INVESTMENT AND RETAIL ENTITLEMENTS

BACKGROUND

During the TUC planning team meeting of September 2nd, the team discussed the need for analyses by ECO on two questions:

Question 1: What is the fiscal case for investing City resources in developing an attractive central place? In other words, what is the return on investment associated with the City spending $10 million or more to bolster the TUC's position as a regional retail center?

Question 2: Assuming the City wants to promote urban office and residential uses in the TOD, (1) Does the City need to remove retail entitlements in the area to get the kind of mixed-use development it desires? and (2) If it does, what reasons, if any, are there to believe that the landowners will be better off for such an action?

Given the short turn-around time for this task, we have not done detailed analyses of the two questions presented above. This memorandum is an internal one (for team members, not for public distribution) providing a sketch-level assessment of the two questions. The goal is to facilitate further discussion among the TUC planning team and to advance the team's collective thinking on the issues.

The planning process the team has been through so far has been typical and productive. We have moved from very general concepts to more specific ones. We are now at a point—internally and with the public—where we will be making decisions about one or two specific directions to evaluate in detail. Our goal in this memorandum is to provide a preliminary assessment of the economic implications of those directions so that neither the team nor the public makes choices that are unwittingly and strongly at odds with economic realities. In pursuit of this goal, we believe we are obliged, at times, to treat what we believe would be wonderful design outcomes with economic skepticism. By playing this role during our internal discussions, the planning team as a whole will be better prepared to address the varied concerns of the public.

QUESTION 1: THE FISCAL CASE FOR CITY INVESTMENT

OVERVIEW

In the categories of dining and destination retail, businesses in the TUC now capture annually close to $1 billion in retail sales, which generate roughly $8 million in sales tax revenues for the City. As the major regional retail center in South King County, TUC retailers compete in a market of as many as a million residents.[1] In 1995, retailers in Tukwila who competed in the dining and destination retail categories captured close to 25% of that market. By 2002, however, the City's capture of these retail categories, while growing slightly in absolute dollars, had fallen to roughly a 20% share.

With residential development occurring along the urban fringe to the east and southeast of Tukwila, it is not surprising that maturing cities like Kent and Auburn have seen increasing commercial development and a related increase in their ability to compete in the retail market. More troubling for Tukwila, however, is that even established cities like Seattle, Renton, and Burien have managed to increase their share of the retail market at Tukwila's expense. In the seven years spanning 1995 to 2001, Seattle, Renton, Burien, Kent, and Auburn each experienced 40% to 50% growth in sales tax revenues, while Tukwila experienced a cumulative increase of only 15%.

Given the size of the market in which TUC retailers compete, even small decreases in market share translates into large fiscal impacts to the City. In a market of one million people, each 1% of market share in dining and destination retail represents nearly $50 million in annual sales, and $420,000 in sales tax revenues to a city. For Tukwila, therefore, the 5% reduction in capture from 1995 to 2002 could be interpreted as a "loss" to the City in excess of $2 million per year (under the assumption that the City should be able to maintain its share). That loss does not include lost opportunities for additional property taxes from new development.

Notwithstanding recent gains made by surrounding cities, it is important to note that the TUC still holds two key advantages: (1) *location* and (2) *retail mass*. Those factors will continue to make the TUC an attractive area for retail customers and, thus, for retail investment and development. That simple statement has both a goods-news and bad-news component for the development of the TUC as envisioned in this project. The good news is that even in the absence of any new City actions or investments, the private sector will be taking actions to slow, stop, or even reverse the erosion of the share of retail sales. The bad-news is that, *at the margin*, various City actions may have a relatively small effect on total retail sales and sales-tax revenue.

Recent developments at SeaTac Mall, six miles to the south in the City of Federal Way, s underscore the strength of Westfield Shopping Center and the TUC. The 736,000 square foot SeaTac Mall has struggled for years and recently sold for $37 million (a very low $50

---

[1] For purposes of this discussion, we include in this definition establishments that compete in the retail categories of *apparel and accessories, general merchandise, furniture and furnishings, miscellaneous retail,* and *eating and drinking places.*

per square foot) to Steadfast Properties (who own one other mall in San Diego). The market's view of SeaTac Mall is that it has limited prospects because it only has two anchors: a Sears and a Bon Marche, with no marquee anchor (e.g., Nordstrom). Steadfast has announced plans for a much-needed remodel, but they do not appear to have any plans for a more aggressive redevelopment. REI may also be signaling diminishing commitment to the SeaTac Mall area by opening new stores in the TUC and in Tacoma.

In contrast with the owners of SeaTac Mall, the expansion plans for Westfield Shopping Center signal that the Mall's new owner believes that it has a strong market position and wants to leverage and consolidate that position. It is likely that the Mall's expansion alone will help to reverse some of Tukwila's recent losses in market share.

THE FISCAL CASE

In previous discussions of potential City actions, our assumption has always been that the City has two complementary goals: (1) to bolster the TUC's position as a regional retail center, thereby protecting the City's primary source of revenue, and (2) to create a central place for the benefit of Tukwila residents, businesses, and visitors. During the planning process for the TUC a third goal emerged that is compatible with the first two: support the transit line on the east edge of the TUC by developing a mixed-use, transit-oriented development (TOD).

During the last team meeting, the question arose: *How well do the proposed developments meet the first goal? Can we make the case that the contemplated City improvements are a good investment?* In other words, what fiscal return is the City likely to see from its investment, and is that return sufficient to warrant the expenditure, purely from a fiscal perspective?

Given the uncertainty surrounding the key variables it is impossible to predict with precision what impact the proposed City improvements will have on long-term City revenues. Some examples of crucial, yet uncertain, factors:

- Absent any City improvements, how aggressive will the Mall expansion be?
- Absent City improvements, how well will the expansion be executed and how successful will it be?
- If the City does pursue investment, how successful would the City be at working with the private sector to create a truly attractive place?
- In the face of City investment to bolster the TUC's position as a regional retail center, how aggressive would developers and neighboring cities be in their efforts to develop attractive commercial/retail/entertainment destinations of their own?
- If the City does not make the investment, how might the lack of public-sector action alter the approach of the potential competitors?

Given all of the areas of uncertainty, we decided the best way to assess the fiscal case for City investment is to assess the threshold scenario for success. Consider the following:

- Assume that the City investment would be $10 million.

- The primary return on that investment is the retail sales tax generated in the TUC, over and above what would have been generated in the absence of the investment.

- At the City's cost of capital (assume 5.5%) the City will break even if it receives an average of $800,000 in additional revenues each year, for twenty years. [Remember: we are taking a purely fiscal perspective here—we are not considering all the other benefits to Tukwila residents of the amenity that the City investment might create.] At the City's local sales tax rate of 0.85%, this would require that the City's investment stimulate an additional $95 million in sales. To put that in perspective, that is about a 10% increase in sales in the TUC.

- One way that $95 million in new sales could be achieved is if the City investment resulted in:

    (1) Development of an additional 200,000 square feet of retail in the TUC (generating an average of $250 per square feet per year); and

    (2) An average increase of $20 per square foot in sales for 2.25 million square feet of "existing" retail in the surrounding area.

In light of all the uncertainties noted above, different TUC team members are likely to have different perspectives on the plausibility of our description of success. On the one hand, $95 million in sales is a 10% increase. On the other hand, $95 million is only 2 percent of the restaurant/destination-retail market in which the TUC competes—in that light, the above threshold scenario certainly seems plausible.

Revisiting our assumption about the level of City investment, it is important to recognize that a doubling or tripling of the cost to the City to $20 or $30 million has the effect of doubling or tripling the necessary conditions for success.

Exhibit B

Version Received May 19, 2009

ECONorthwest
ECONOMICS • FINANCE • PLANNING

VOICE• (206) 622-2403
FAX • (206) 838-5000
EMAIL • info@seattle.econw.com

412 MUTUAL LIFE BUILDING
605 FIRST AVENUE
SEATTLE, WA 98104

OTHER OFFICES
EUGENE • (541) 687-0051
PORTLAND • (503) 222-6060

Sept 11, 2003

TO: TUC study team members
FROM: Terry Moore and Brett Sheckler
SUBJECT: ASSESSMENT OF FISCAL CASE FOR INVESTMENT AND RETAIL ENTITLEMENTS

BACKGROUND

During the TUC planning team meeting of September 2nd, the team discussed the need for analyses by ECO on two questions:

Question 1: What is the fiscal case for investing City resources in developing an attractive central place? In other words, what is the return on investment associated with the City spending $10 million or more to bolster the TUC's position as a regional retail center?

Question 2: Assuming the City wants to promote urban office and residential uses in the TOD, (1) Does the City need to remove retail entitlements in the area to get the kind of mixed-use development it desires? and (2) If it does, what reasons, if any, are there to believe that the landowners will be better off for such an action?

Given the short turn-around time for this task, we have not done detailed analyses of the two questions presented above. This memorandum is an internal one (for team members, not for public distribution) providing a sketch-level assessment of the two questions. The goal is to facilitate further discussion among the TUC planning team and to advance the team's collective thinking on the issues.

The planning process the team has been through so far has been typical and productive. We have moved from very general concepts to more specific ones. We are now at a point—internally and with the public—where we will be making decisions about one or two specific directions to evaluate in detail. Our goal in this memorandum is to provide a preliminary assessment of the economic implications of those directions so that neither the team nor the public makes choices that are unwittingly and strongly at odds with economic realities. In pursuit of this goal, we believe we are obliged, at times, to treat what we believe would be wonderful design outcomes with economic skepticism. By playing this role during our internal discussions, the planning team as a whole will be better prepared to address the varied concerns of the public.

QUESTION 1: THE FISCAL CASE FOR CITY INVESTMENT

OVERVIEW

In the categories of dining and destination retail, businesses in the TUC now capture annually close to $1 billion in retail sales, which generate roughly $8 million in sales tax revenues for the City. As the major regional retail center in South King County, TUC retailers compete in a market of as many as a million residents.[1] In 1995, retailers in Tukwila who competed in the dining and destination retail categories captured close to 25% of that market. By 2002, however, the City's capture of these retail categories, while growing slightly in absolute dollars, had fallen to roughly a 20% share.

With residential development occurring along the urban fringe to the east and southeast of Tukwila, it is not surprising that maturing cities like Kent and Auburn have seen increasing commercial development and a related increase in their ability to compete in the retail market. More troubling for Tukwila, however, is that even established cities like Seattle, Renton, and Burien have managed to increase their share of the retail market at Tukwila's expense. In the seven years spanning 1995 to 2001, Seattle, Renton, Burien, Kent, and Auburn each experienced 40% to 50% growth in sales tax revenues, while Tukwila experienced a cumulative increase of only 15%.

Given the size of the market in which TUC retailers compete, even small decreases in market share translates into large fiscal impacts to the City. In a market of one million people, each 1% of market share in dining and destination retail represents nearly $50 million in annual sales, and $420,000 in sales tax revenues to a city. For Tukwila, therefore, the 5% reduction in capture from 1995 to 2002 could be interpreted as a "loss" to the City in excess of $2 million per year (under the assumption that the City should be able to maintain its share). That loss does not include lost opportunities for additional property taxes from new development.

Notwithstanding recent gains made by surrounding cities, it is important to note that the TUC still holds two key advantages: (1) *location* and (2) *retail mass*. Those factors will continue to make the TUC an attractive area for retail customers and, thus, for retail investment and development. That simple statement has both a goods-news and bad-news component for the development of the TUC as envisioned in this project. The good news is that even in the absence of any new City actions or investments, the private sector will be taking actions to slow, stop, or even reverse the erosion of the share of retail sales. The bad-news is that, *at the margin*, various City actions may have a relatively small effect on total retail sales and sales-tax revenue.

Recent developments at SeaTac Mall, six miles to the south in the City of Federal Way, s underscore the strength of Westfield Shopping Center and the TUC. The 736,000 square foot SeaTac Mall has struggled for years and recently sold for $37 million (a very low $50

---

[1] For purposes of this discussion, we include in this definition establishments that compete in the retail categories of *apparel and accessories, general merchandise, furniture and furnishings, miscellaneous retail,* and *eating and drinking places.*

per square foot) to Steadfast Properties (who own one other mall in San Diego). The market's view of SeaTac Mall is that it has limited prospects because it only has two anchors: a Sears and a Bon Marche, with no marquee anchor (e.g., Nordstrom). Steadfast has announced plans for a much-needed remodel, but they do not appear to have any plans for a more aggressive redevelopment. REI may also be signaling diminishing commitment to the SeaTac Mall area by opening new stores in the TUC and in Tacoma.

In contrast with the owners of SeaTac Mall, the expansion plans for Westfield Shopping Center signal that the Mall's new owner believes that it has a strong market position and wants to leverage and consolidate that position. It is likely that the Mall's expansion alone will help to reverse some of Tukwila's recent losses in market share.

THE FISCAL CASE

In previous discussions of potential City actions, our assumption has always been that the City has two complementary goals: (1) to bolster the TUC's position as a regional retail center, thereby protecting the City's primary source of revenue, and (2) to create a central place for the benefit of Tukwila residents, businesses, and visitors. During the planning process for the TUC a third goal emerged that is compatible with the first two: support the transit line on the east edge of the TUC by developing a mixed-use, transit-oriented development (TOD).

During the last team meeting, the question arose: *How well do the proposed developments meet the first goal? Can we make the case that the contemplated City improvements are a good investment?* In other words, what fiscal return is the City likely to see from its investment, and is that return sufficient to warrant the expenditure, purely from a fiscal perspective?

Given the uncertainty surrounding the key variables it is impossible to predict with precision what impact the proposed City improvements will have on long-term City revenues. Some examples of crucial, yet uncertain, factors:

- Absent any City improvements, how aggressive will the Mall expansion be?
- Absent City improvements, how well will the expansion be executed and how successful will it be?
- If the City does pursue investment, how successful would the City be at working with the private sector to create a truly attractive place?
- In the face of City investment to bolster the TUC's position as a regional retail center, how aggressive would developers and neighboring cities be in their efforts to develop attractive commercial/retail/entertainment destinations of their own?
- If the City does not make the investment, how might the lack of public-sector action alter the approach of the potential competitors?

Given all of the areas of uncertainty, we decided the best way to assess the fiscal case for City investment is to assess the threshold scenario for success. Consider the following:

- Assume that the City investment would be $10 million.
- The primary return on that investment is the retail sales tax generated in the TUC, over and above what would have been generated in the absence of the investment.
- At the City's cost of capital (assume 5.5%) the City will break even if it receives an average of $800,000 in additional revenues each year, for twenty years. [Remember: we are taking a purely fiscal perspective here—we are not considering all the other benefits to Tukwila residents of the amenity that the City investment might create.] At the City's local sales tax rate of 0.85%, this would require that the City's investment stimulate an additional $95 million in sales. To put that in perspective, that is about a 10% increase in sales in the TUC.
- One way that $95 million in new sales could be achieved is if the City investment resulted in:

  (1) Development of an additional 200,000 square feet of retail in the TUC (generating an average of $250 per square feet per year); and

  (2) An average increase of $20 per square foot in sales for 2.25 million square feet of "existing" retail in the surrounding area.

In light of all the uncertainties noted above, different TUC team members are likely to have different perspectives on the plausibility of our description of success. On the one hand, $95 million in sales is a 10% increase. On the other hand, $95 million is only 2 percent of the restaurant/destination-retail market in which the TUC competes—in that light, the above threshold scenario certainly seems plausible.

Revisiting our assumption about the level of City investment, it is important to recognize that a doubling or tripling of the cost to the City to $20 or $30 million has the effect of doubling or tripling the necessary conditions for success.

QUESTION 2: ISSUES SURROUNDING RETAIL ENTITLEMENTS IN THE TOD

During the TUC planning team conference call of July 21st, FTB proposed a strategy that called for concentrating Phase 1 City investments in an area immediately adjacent to the Mall. The rationale behind this strategy was that such a concentration of resources would avoid diluting a limited pool of City resources and ensure the greatest fiscal return on investment (by concentrating City dollars on the task of bolstering the competitive position of the regional retail center). Another component of FTB's proposed strategy was for the City to promote land use changes in the TOD through the combination of changes in land use policy and leveraging the effect of the rail station and development of the high-amenity center connecting to the Mall.

Among the topics of conversation during both that conference call and the subsequent September 2nd team meeting was the issue of the potential barrier that existing retail entitlements in the TOD (i.e., the zoning that allows property owners in the TUC to develop, by right, retail) presented to redevelopment of the TOD area.

We noted in ECO's 2002 *Tukwila Urban Center Market Analysis* that *one* of the barriers to residential and office development was the relatively high land values in the area—values that are driven by the potential for retail uses. The TUC planning team noted that if the potential for retail uses could be eliminated, then the resulting decrease in land values would improve the viability of other forms of redevelopment. The obvious economic point here is that to get non-retail uses in the north end of the TUC (to further the goal of creating a vibrant, mixed-use, transit-oriented city center) when the market is apparently willing to build entirely retail (and pay higher land prices to do so), means that (1) other uses are of less value and interest to landowners, and (2) they are not likely to get built to any degree unless either (a) the City subsidizes their development, (b) retail uses are disallowed (entitlements removed) by changing the zoning (downzoning), or (c) both.

Thus, one of the questions the team posed was: *Is there a reason to believe that if the City took such an action landowners would not necessarily be worse off?* At the center of this question lies an obvious, but fundamental, point:

> *By definition, absent some form of external payment, it is not possible to take an action that reduces property values without hurting the landowners whose property values have been reduced.*

Given this observation, there are two possible ways that landowners might not be hurt by removal of retail entitlements, which might be explained to them as follows:

1. The goal is not really to reduce property values at all. Rather, the goal is to combine public investment and land use actions to provide higher-value opportunities for residential/office/lodging development that would, in turn, drive higher land values. Or...

2. The City recognizes that taking away retail entitlements will hurt some landowners in the short run, but as a group TUC landowners will be better off in the long run. Early stage redevelopment (which will take place on land of reduced value) will provide a foundation that will make future residential/office/lodging development more attractive, thereby making the remaining property owners better off.

Without a description and evaluation of concrete actions to fundamentally change the character of the TOD, both stories are somewhat speculative. But some fundamental points are probably true of both stories:

- In a hypothetical retail area in which all land is currently developed (in buildings, parking, and streets), then the only way to do large scale redevelopment (as opposed to remodeling) is to own or buy property currently being used for buildings or parking. Since the buildings have both improvement / replacement value, and income value, the developed property will be more expensive than (nonexistent) vacant land. Thus, in some cases, the effective cost of land could be two to four times greater than the cost of vacant land.

- Land, however, is not the primary cost of development: building is. For single-family detached housing, land can be as much as one-third of the final and full cost of development. For multifamily apartments the percentage is much less, as it is for office and some retail (the exact number depend on the density—number of floors—of development). The main point is that a doubling of land cost may make the cost of a given type of development only 5% to 20% more expensive.

- For many of the properties in the TOD, altering retail entitlements will have little short-term impact on land values. Most properties are already developed and currently support viable commercial activities. Development in the TOD means primarily redevelopment.

  Given the need to redevelop parcels with existing uses, the cost of acquiring developable land generally exceeds the value of undeveloped retail property. If there is little demand for redevelopment, then the entitlements would have little value, with one exception. They have little value because (1) in essence the value of the entitlement has already been cashed in when the previous development took place, and (2) even if the entitlement were taken away, the existing retail development could presumably continue to operate as a conforming use. The exception is that even in this case the entitlements do have a value in the form of the long-term option value associated with the potential for (1) redevelopment at some point in the future, and (2) remodeling and upgrading of existing retail (which could be limited if zoning were changed)..

- Ultimately, under either of the above stories, the key to making the case (1) that the TOD is redevelopable for residential/office/lodging uses, and (2) that landowners will be made better off by moving in that direction, revolves around providing *amenity* to support above-market rents for office or residential uses.

- Given the greenfield development that is anticipated in areas immediately surrounding the TUC, the market rates for residential, office, lodging, and even retail uses will be affected, if not driven, by the relatively low costs of developing large tracts of $8 per square foot land. With raw land available at $8 per square foot, developers can build and rent office space, for example, for roughly $20 per square foot. By contrast, building office on a site in the TOD that costs $25 per square foot to acquire would require rents that are 20 to 25 percent higher.

- In addition to the cost advantages associated with greenfield development, such development of large tracts of land also allows the developer to have a great deal of control over the amenities of the site. For the same to be true in the TOD, some form of aggregation of parcels will probably be necessary.

- The rail station *does* provide a tangible benefit to the TOD. However, most of the studies that assess the impact of rail stations on property redevelopment have found that the effect, if it exists at all, is limited to a relatively small area. While residents and employees *will* walk thousands of feet to and from a rail station, the evidence suggests that few will pay a premium in rents to do so.

- Ultimately, office and residential users are willing to pay a premium for high amenity locations. For the TOD, the key will be to provide that amenity in a manner that distinguishes the area from competing developments surrounding areas, including the Segale property, Kent station, and Renton.